contended for in this case, and thereby setting a dangerous precedent. The decision is a forcible enunciation from the highest Court of the land, speaking through its head, that, in order to be free of contempt of the Supreme Court of the United States, not only must an officer in charge of a Federal prisoner do nothing actively in interfering with such prisoner, but he must take all reasonable and necessary precautions to prevent interference by others.

Federal Jurisdiction Over a State Conducting a Private Business.

The jurisdiction of the Federal Courts, in suits against a State, is amply controlled by principles and decisions. The difficulty lies in the interpretation of the facts and their proper classification under the principles which govern.

In *Murray* v. *Wilson Distilling Co.*, the Circuit Court [1] erred in its interpretation and classification of the facts. Thereafter the Supreme Court of South Carolina,[2] in a well-reasoned opinion, properly interpreted the facts and the Supreme Court of the United States [3] sustained their interpretation and applied the established principles of law.

The State, under its police power, had engaged in the liquor business and later, upon closing out the business, made the defendant a commission to settle accounts. The plaintiff, a creditor for liquor sold to the State Dispensary, sought to collect by suit the amount due, but the defendant pleaded that the State was the real party in interest and had not consented to the suit.

There was here no question of any unconstitutional statute, but the defendant was acting as the lawful agent of the State in a lawful transaction. The plaintiff's relation was one arising purely out of contract—a mere creditor and debtor relation. The contract had been with the State and the mere appointment of the Commissioner to adjudicate and settle claims did not change the relation but left the State the real party to be affected by the decision.

Where the State is the real party in interest and is acting in its sovereign capacity in a field unrestricted by the higher sovereignty of the United States Constitution, proceedings cannot be

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[1] 164 Fed. 1 (1908).

[2] 79 S. C. 316 (1908).

[3] 29 Sup. C. R. 458, 213 U. S.

had, against its consent, to compel it to perform its contracts,[4] even though it is engaged in a normally private business. He who deals with a sovereign body must abide the sovereign grace. But, where the sovereignty of the State is limited [5] by the greater sovereignty of the Constitution and suit is brought against defendants who, claiming to act as officers of the State and under cover of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff, acquired under a contract with the State, such suit (whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State; or for compensation in damages; or in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of a plain, legal duty, purely ministerial) is not, within the meaning of the Eleventh Amendment, an action against the State.[6]

The State can act only through it agents. These agents must act under a lawful authority.[7] When the State constitutionally can and does confer the authority, the agent may be compelled to perform a purely ministerial duty, but not where he is vested with discretion,[8] be it judicial or executive. When the State has not or could not grant authority to the agent, or where the agent has refused to act in defiance of a valid authority, the agent can secure no protection under the sovereign rights of the State.[9]

This protection against suit by a private individual was formerly considered as due to the Eleventh Amendment only; but this right had long been considered as an incident of sovereignty and it is now so treated.[10] Because of this sovereign right of a State to be free from interference by private individuals in the sovereign acts of the State or the valid discretion vested in its officers, a private individual must show either that

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[4] *South Carolina* v. *U. S.*, 199 U. S. 437 (1905); *Ex parte* Young, 209 U. S. 123 (1908); *Osborn* v. *Bank*, 9 Wheat. 738 (1824); *Hagood* v. *Southern*, 117 U. S. 52 (1896); *In re* Ayres, 123 U. S. 443 (1887); *Christian* v. *Atlantic R. R.*, 133 U. S. 233 (1890).

[5] Virginia Coupons Case, 114 U. S. 270 (1884); *U. S.* v. *Lee*, 106 U. S. 196 (1882); *Pennoyer* v. *McConmaughy*, 140 U. S. 1 (1891).

[6] *Tindal* v. *Wesley*, 167 U. S. 220 (1897); *Reagan* v. *Farmer's L. & T. Co.*, 154 U. S. 363 (1894).

[7] *Ex parte* Young, 209 U. S. 124 (1908); *In re* Ayres, *supra.*

[8] *Board of Liquidation* v. *McComb*, 92 U. S. 531 (1875).

[9] *Reagan* v. *Farmer's Loan*, 154 U. S. 388 (1893).

[10] *Kawananakoa* v. *Polyblank*, 205 U. S. 349 (1907).

the State consents to the suit; that the matter is without the State sovereignty; that the officer is not protected by a lawful authority, or has disregarded a lawful authority when no discretion is attached.[11]

The facts of the present principal case were within the sovereign acts of the State, the suit was against the State acting in its sovereign capacity and attempted to control a lawful discretion of the officers of the State, any of which would prevent the jurisdiction against the consent of the State.

LAND DAMAGES FOR CHANGE OF GRADE IN PENNSYLVANIA.

The case of *Jamison* v. *Cumberland County,* 39 Pa. Super. Ct. 335, while a brief *per curiam* decision, suggests the possibility that the recent legislation in Pennsylvania for the improvement of highways may have opened up a new field of operations for the land damage claimant with the incidental result of depleting State, county and township treasuries. The Act of May 1, 1905, P. L. 318, which provides for the improvement of the highways at the joint expense of the State, county and township, contains in Section 16 a provision that the Commonwealth shall not be liable for damages arising from the rebuilding or improvement of highways under the act. But "in case any person or persons, or corporations, shall sustain damage by any change in grade, or by the taking of land to alter the location of any highway which may be improved under this act, and the county commissioners and the parties so injured cannot agree on the amount of damages sustained, such persons or corporations may present their petition to the Court of Quarter Sessions for the appointment of viewers to ascertain and assess such damage; the proceedings upon which said petition and by the viewer shall be governed by the laws relating to the assessment of damages for opening public highways, and such damages, when ascertained, shall be paid by the respective counties, and afterwards apportioned by the State Highway Commissioner according to the provisions of section fifteen."

This section was amended by the Act of June 8, 1907, P. L. 505, so as to read in the same way except that the words "by any change of grade" were omitted. The decision of *Jamison* v. *Cumberland County* is the obvious one that the Act of 1907 repealed the Act of 1905 in so far as it related to damages for

[11] *Fitts* v. *McGhee,* 172 U. S. 516 (1899); *Ex parte* Young, *supra.*